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Thursday, June 22, 2006

Metabolite dismissed, but no justice argues "law of nature" claim is valid

We are going to have to wait longer for the U.S. Supreme Court's opinion on the section 101 patentable subject matter jurisprudence of the last two decades, in which the Federal Circuit sharply diverged from Supreme Court precedent. That's because the Court dismissed *LabCorp. v. Metabolite* on a procedural "technical issue," namely LabCorp's failure to properly raise the section 101 issue at the original trial. Justice Breyer, joined by Stevens and Souter, wrote a strong dissent arguing that the case should be decided and the patent's claim to a "law of nature" held invalid. This dissent looks like a passing of the torch of section 101 enforcement from Stevens, the author of *Parker v. Flook,* to a new generation of justices. Breyer's opinion suggests that he at least vaguely recognizes the *Neilson/Morse/Funk/Flook* methodology, which the Federal Circuit has long rejected despite the many Supreme Court precedents, including *Flook,* that upheld it. I'll probably analyze Breyer's dissent in a subsequent post.

It is unknown where the other justices stand on section 101, although it's probable that at least Ginsburg joined by some of the conservative justices would have agreed with the Federal Circuit's jurisprudence and argued based on dicta in *Diamond v. Chakrabarty* that "anything under the sun" can be patented. Instead, however, these justices agreed with the procedural dismissal and thus avoided making an argument that Metabolite's claim to (as the dissent accurately described it) "any test" combined with a "law of nature" was valid.

I find that, although I agree with the substance of the dissent (claim 13 is invalid under section 101 as an attempt to patent a "law of nature," and it's not even a close call), I agree with the majority that this case should be dismissed for failure to properly raise the issue at trial level. Rather than specifically raise section 101, LabCorp engaged in vague hand-waving at the trial level. At the Federal Circuit level it made a 101-type argument and cited some 101 cases, but inexplicably still failed to directly cite section 101! It's grossly unfair and very costly to require already overburdened attorneys to respond to arguments that are poorly researched or amount to vague hand-waving, which is what LabCorp's implied section 101 arguments were here at the trial level and even to some extent at the Federal Circuit. LabCorp's failure to properly raise the issue allowed the Federal Circuit to completely ignore it, so that the Supreme Court was actually analyzing the 101 issue in this case for the first time, without proper fact-finding under section 101 below: something that it should be extremely loathe to do.

Posted by Nick Szabo at 11:30 AM

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Nick Szabo

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